

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MATT FARMER)	
Claimant)	
VS.)	
)	
AT&T)	Docket No. 241,576
Respondent)	
AND)	
)	
GATES McDONALD)	
Insurance Carrier)	

ORDER

Claimant appeals from the Supplemental Order entered by Administrative Law Judge Robert H. Foerschler on January 18, 2000.

APPEARANCES

Michael W. Downing of Kansas City, Missouri, appeared on behalf of claimant. Stephen C. Alberg of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board considered the November 18, 1999 Transcript of Preliminary Hearing, the September 9, 1999 Transcript of Motion, and the June 24, 1999 Transcript of Proceedings, together with the pleadings and other documents contained in the administrative file.

ISSUES

The ALJ assessed the maximum weekly penalty, \$100 a week, for 16.86 weeks, for respondent's failure to pay claimant weekly temporary total disability compensation (TTD) for a period beginning September 23, 1999. The ALJ also denied respondent's motion to terminate TTD finding that, contrary to respondent's allegation, claimant was not gainfully employed. TTD was ordered to continue at the maximum allowable rate of \$366 a week "until Dr. Ketchum releases claimant to return to his regular work."

Claimant argues that the ALJ erred by amending his previous order which had provided for additional weekly TTD benefits. Claimant seeks to have those benefits reinstated. Claimant also alleges the ALJ should have assessed additional penalties for

respondent's failure to pay TTD benefits for those weeks beginning June 24, 1999 through September 23, 1999 which had been ordered paid by Judge Foerschler in his July 13, 1999 Preliminary Decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Board concludes the Supplemental Order entered by the ALJ should be affirmed.

Claimant seeks penalties for respondent's alleged failure to comply with Judge Foerschler's July 13, 1999 preliminary hearing order.

On July 13, 1999 Judge Foerschler entered a Preliminary Decision finding the Kansas Workers Compensation Act applied to this claim. That decision was appealed to the Appeals Board and Judge Foerschler's findings and conclusions on Kansas jurisdiction were affirmed. The Preliminary Decision ordered respondent and its insurance carrier to provide additional medical treatment and temporary total disability compensation was ordered paid as of the date of the hearing, which was held on June 24, 1999. On July 16, 1999 claimant filed a Demand for Compensation, pursuant to K.S.A. 44-512a, for the benefits ordered by the July 13, 1999 Preliminary Decision.

On August 24, 1999 respondent and its insurance carrier filed a Motion to Clarify Preliminary Order, Amounts and Carrier wherein it was alleged that Gates McDonald was the proper carrier rather than Hartford Accident and Indemnity and that the order failed to specify the compensation rate for the temporary total disability. Respondent further alleged that the TTD rate claimant was seeking exceeded the maximum compensation rate allowable on the date of accident.

On September 7, 1999 respondent and its insurance carrier filed a Motion to Terminate Compensation And/or Dismiss Proceedings alleging claimant was self-employed and currently working, that claimant had failed to cooperate with a medical examination arranged by respondent, and there was no finding or order as to the compensation rate at which temporary total disability was to be paid.

The January 18, 2000 Supplemental Order supplements an Order for Penalties the ALJ issued on November 29, 1999. In that November 29, 1999 order the ALJ clarified that the temporary total disability benefits he ordered on July 13, 1999, were to commence June 24, 1999, the date of the hearing, and claimant's entitlement to past temporary total disability compensation was to be considered at a later date. Based upon the inadequacy of the record and the parties' failure to reach any agreement on the average weekly wage, and hence the proper compensation rate, Judge Foerschler took under advisement the matter of penalties and the amount of temporary total disability compensation due. The parties were ordered to produce certain records including payroll and wage information within 30 days.

Although a wage statement was apparently not forthcoming from the respondent, the parties were able to stipulate that claimant was entitled to the maximum allowable rate of compensation. Claimant provided information concerning his "earnings" from day trading in stock which showed a net loss.

In addition to penalties, claimant also seeks an order reinstating temporary total disability compensation which claimant argues was awarded and then rescinded. Respondent counters that the Board is without jurisdiction to decide this issue because this is a pre-Award proceeding and, therefore, the TTD award is a preliminary hearing order. This is not the first time the Board has had to address the issue of the Board's jurisdiction to review an ALJ's decision concerning whether or not to award temporary total disability compensation pre-Award. In fact, the Board addressed that question in a prior appeal in this case. In its Order of September 23, 1999, the Board said "the issue dealing with claimant's entitlement to temporary total disability compensation does not give rise to Appeals Board jurisdiction on an appeal from a preliminary hearing. See K.S.A. [1999 Supp.] 44-534a and K.S.A. [1999 Supp.] 44-551. Therefore, respondent's appeal of that issue is dismissed." On this appeal, the Board finds that it is likewise without jurisdiction to consider claimant's appeal of the issue concerning his entitlement to TTD compensation.

Turning now to the matter of penalties, the ALJ's Supplemental Order provides in pertinent part:

After September 23, 1999, it was beyond any dispute that respondent owed temporary total disability, which would entitle claimant to the maximum weekly benefit of \$366.00, as suspected. The penalty section allows a penalty, not exceeding \$100.00 a week, for each week any disability payment is past due. The maximum will be taxed in this case and respondent is ordered to pay \$466.00 per week since September 23, 1999, or 16.86 weeks, and continuing paying \$366.00 a week temporary total disability until Dr. Ketchum releases claimant to return to his regular work.

Claimant contends that because the July 13, 1999 Preliminary Decision ordered respondent to pay TTD commencing June 24, 1999, and no such benefits were paid until February 2000, the ALJ erred by not ordering penalties for the period of June 24, 1999 through September 23, 1999. The ALJ apparently selected September 23, 1999 as the date to commence penalties because that was the date of the Board's issuance of its Order on the respondent's appeal of the ALJ's July 13, 1999 Preliminary Decision. There is no suggestion by any party or by the ALJ that respondent's appeal somehow operated as a stay of the ALJ's order. In fact, respondent acknowledged its obligation to provide the ordered preliminary benefits, including the payment of TTD. Respondent, however, gives four reasons in defense of its failure to pay: (1) The ALJ's order did not specify the rate at which TTD was to be paid; (2) The claimant's prayer was for \$366 a week, which respondent believed exceeded the maximum benefit allowed for the date of accident alleged; (3) The Preliminary Decision erroneously named the respondent's insurance carrier as The Hartford, when the carrier is actually Gates McDonald; and (4) The ALJ had agreed at the June 24, 1999 preliminary hearing to take the issue of TTD under advisement until Dr. Baker

could issue a report on the question of causation and whether claimant was temporarily and totally disabled.

None of these first three arguments excuse respondent from its obligation to pay TTD at least at the maximum rate respondent believed applicable. As claimant points out, respondent would be entitled to a credit for any overpayment of TTD against the final award. If the award was inadequate, then respondent would be eligible for reimbursement from the Fund. Of greater significance, however, is respondent's fourth argument because at the hearing on respondent's motions to clarify the preliminary hearing order and to terminate compensation, and on claimant's motion for penalties, Judge Foerschler decided to order an IME by Dr. Ketchum on September 15, 1999 and apparently gave this fourth argument by respondent some credence in his decision not to assess a penalty for the period in question. In his January 18, 2000 order, the ALJ seemingly also took under advisement until time of final award whether to order TTD paid for the period before September 23, 1999.

Because of the uncertainties surrounding the ALJ's initial TTD award and because the ALJ subsequently reconsidered his decision and determined to take the matter under advisement, the Board does not consider it appropriate to assess respondent with additional penalties.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated January 18, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Kansas City, MO
Stephen C. Alberg, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director